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IN THE

Supreme Court of the United States

October Term, 1957

Nos. 440 and 441

MORTON SOBELL,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

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The petitioner, Morton Sobell, prays for a rehearing and reversal of the order of this Court entered November 12, 1957, denying his petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit.

This petition for rehearing is made pursuant to the provisions of Rule 58 of the Rules of this Court upon substantial grounds available to the petitioner although not previously presented.

Reasons Why a Rehearing Should Be Granted and Writs of Certiorari Issued

I.

There are some cases which, though formally dealing with the rights of a single individual, inescapably pose deeper questions relating to the ability of our society to exercise properly the powers of a state. No one case that we know of raises such questions as seriously as this one.

This Court hardly need be reminded that this case is a tragedy of the cold war. Few thinking men or women will challenge the assertion that its course was affected adversely by fear, by passion and by extrinsic political considerations. A long chain of events, from the prosecution's seizure of petitioner in Mexico without the consent, participation or knowledge of that government, to the last days preceding the execution of his co-defendants,* to the incarceration of petitioner in Alcatraz Penitentiary, proclaims this fact.

But with apparent unanimity, this Court still refuses to exercise its certiorari jurisdiction and examine the serious questions bearing upon the validity and integrity of this trial. Unfortunately the recent comment of Professor Bernard Schwartz, *The Supreme Court*, remains valid:

> "Perhaps we are being overcritical of the Court's action in the *Rosenberg* affair. The case itself and the judicial disposition of it are but symptoms of the period of tension through which we have been passing. To talk of the commonwealth as endowed with life is more than a mere metaphor. The political, like the animal, body has its periods of sickness and vigor. The past decade and a half has, without any doubt, been one in which our body politic has been constantly afflicted. At such a time, it is to be expected that much of the vital spark goes out of the society, as it would out of an afflicted individual. This understood, let it not seem idle if we refer once again to the fact that our old

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* See 54, *Columbia Law Review*, 219 at page 260:

"The inevitable conclusion is that in this last stage of an extraordinarily protracted litigation, the rights of the Rosenbergs did not receive the precise and extensive consideration that must characterize the administration of the criminal law. Whether the Rosenbergs were in fact guilty is beside the point. In the vindication of their rights, they were entitled to the equality of treatment afforded by the technical safeguards of the law."

> Physician's Aphorism holds in politics and law, as it does in animal life. In a period of cold war, the law knows of its health, as it could never be expected to in less troubled times. It should, however, be recognized that, in the animal body, health is the natural, sickness the artificial, state. The cold-war jurisprudence of the highest Court may thus be characterized as an artificial jurisprudence. In all vital things, men distinguish between artificial and natural, with the artificial being considered as something inferior. Few students of the Supreme Court will deny that this is true as well of the recent 'artificial' jurisprudence of the high tribunal. To be sure, the day will come when the body politic, like the animal body, will be restored to its pristine state of full vigor. We cannot, of course, know just when that will happen, just as no one at the bottom of an economic cycle can be sure just when prosperity will come around the corner. Yet happen it will, in our legal as in our political life. Then it will be that cases like some of those discussed in this chapter will be looked upon as the aberrations in the law that they really are." (At p. 341)

* * *

Subsequent to the submission of these petitions, the Government, through the extraordinary medium of a national magazine, announced that it recognized that world-wide doubts remain concerning the fairness of petitioner's conviction. By means of a government-sanctioned article in *Look Magazine* of October 29th, it advised the public that it had prepared a report for publication to be used in an attempt to put these questions to rest.

We urge the Court to reconsider these petitions in light of the Government's concession, novel as the form may be, that the public interest requires a further airing of the questions beclouding this case. It is more appropriate to invoke the certiorari jurisdiction of this Court than the channels of the press to resolve such issues.

Justice is not served by a refusal to review these charges underlying the present petitions. How is this nation strengthened by the denial of a hearing to a scientist imprisoned in the harshest of our penal institutions? What societal value is served by a curt refusal to grant this man the day in court any prisoner would have received on the basis of similar allegations? Must petitioner's showing in his moving papers exceed that demanded in the case of any common criminal? See *Chessman* v. *Teets*,— U. S. —, 77 S. Ct. 1127.

For surely, these petitions were not devoid of legal merit. And can it be said that the petitions were denied for failure to raise issues of weight and substance worthy of the certiorari jurisdiction of this Court? For, what is weightier than the conscience of a nation and its sense of right-doing and fair play?

So long as this case remains unreviewed by this Court, so long as a veil of judicial obscurity lies across it, so long as petitioner is denied an opportunity to prove his charges, no final judgment can be made upon the verdict rendered in this case. This Court has failed on at least eight occasions to consider this case, to determine whether this trial was in accord with basic concepts of due process. This has not served to enhance the prestige of our system of law.

As in all chapters of man's inhumanity to man, no one can hide injustice forever. Petitioner persists in his claim of innocence. We are convinced that he will be freed, that he will not be forced to suffer the full penalty of a thirty-year sentence. But is it necessary that he should lie incarcerated until the slow processes of history expose to the light of day his claims of injustice? Is it not the very purpose and heart of the writ to avoid such an unfortunate result?

The records of this Court are replete with evidence that it has expressed a high degree of concern and sensitivity to the administration and scope of habeas corpus proceed-

ings in both the federal and state courts. *Sunal* v. *Lodge*, 332 U. S. 174; *Van Moltke* v. *Gillies*, 332 U. S. 708; *Price* v. *Johnston*, 334 U. S. 266; *Commonwealth of Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116; *Chessman* v. *Teets*, — U. S. —, 77 S. Ct. 1127.

This Court has afforded review in habeas corpus proceedings where grounds normally required in granting certiorari have not been present. In *Alcorta* v. *Texas*, October Term, 1957, No. 139, decided November 12, 1957, the Court was faced with no novel question of habeas corpus law. It has long been established that such conduct by the prosecution constitutes a denial of due process and invalidates a conviction. But due regard for justice and the prestige of our courts impel a reviewing court to act in such circumstances. The very possibility that a prosecutor will misuse his office to contrive a fraudulent conviction is so abhorrent to our system of law that this Court has been alert to examine cases which, on their face, suggest the possibility of such a wrong. Thus, the refusal of this Court to grant petitioner's applications for writs of certiorari is a departure from the Court's recognition of its particular role in intervening where prejudice threatens a miscarriage of justice.

We do not mean to suggest that this Court should improvidently grant petitioner's applications for writs of certiorari if there were no conceivable merit in his contentions or no conceivable substance in the questions he has raised in the two petitions. Nor do we suggest that certiorari should be granted merely because of the conviction by many that this case is an aberration in the law. But we do believe that these considerations warrant the Court's attention before determining its final position in the present proceedings. These considerations are "special and immediate reasons", which, superimposed upon the grounds heretofore tendered, make necessary the exercise of certiorari jurisdiction. It is time for this Court to review this case.

II.

On the very day this Court denied relief to petitioner, it rendered its decision in *Alcorta* v. *Texas, supra,* reversing the judgment of conviction. Petitioner, unlike Alcorta, was never granted a hearing on his charges and, hence, the burden carried by him in seeking review by this Court is more limited than that imposed upon Alcorta.

A comparison of the record of the two cases does not reveal any significant legal differences. In both instances, the prosecution's misconduct was of the same nature—the merger of perjured and misleading testimony accompanied by the suppression of evidence which would have altered and recast the significance and meaning of that testimony in the minds of the jurors. In both cases, the testimony referred to issues unrelated to the actual commission of the alleged offense, and in both instances, the rationale of the prosecutor was the same—that the suppressed evidence was not legally significant.*

Was not Huggins' testimony, like Castilleja's, in *Alcorta,* false and misleading when he characterized petitioner as a deportee and when he attested to the correctness of the entry "Deported from Mexico" on Government Exhibits 25 and 25A, and when he said the petitioner was brought to Laredo by persons acting in their "official capacity"? (R. 1026). Was not the prosecution fully aware of the impression made upon the jury that this was the "other evidence of deportation" promised by Mr. Cohn? (R. 926). The prosecution and Huggins knew that the testimony would have had a completely different impact if the jury had been advised that agents of the FBI abducted petitioner; that the Mexican Government protested rather than participated in or condoned this act. Would not the fully

* This rationale was adopted by the District Court in denying petitioner's motion (A. 220).

disclosed truth have eliminated the prejudicial impression that the Mexican Government considered it necessary to remove petitioner as an undesirable alien and over his objection?

The suppressed facts in *Alcorta* were more susceptible to discovery than those hidden from petitioner by the prosecution. Here the suppressed evidence was particularly difficult to unear a, relating as it did to purported international transactions and understandings. The prosecution framed its questions in interrogating Huggins so as to prevent disclosure that (1) its own agents illegally seized and abducted appellant; (2) the Mexican Government in no way participated in or authorized this act; and (3) representatives of the Mexican Government on at least two occasions advised the prosecution that Mexico did not sanction these illegal actions (A. 25-29). And it was just this evidence, unknown to petitioner, which was necessary to the prosecution's fraud (A. 20, 74).

Nor could petitioner have been expected to obtain the full story of his removal from Mexico to rebut Huggins' testimony and Government Exhibit 25A.* Not only was he incarcerated continuously from the time of his arrival in Laredo; not only did he lack the facilities and funds to institute such an investigation, but he could not foresee

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* The district court attempted to respond to petitioner's contention by referring to his subpoena *duces tecum* served upon the Mexican Consulate in New York directing it to produce his application for a tourist card as proof of his lawful entry into that country. The Mexican Consulate refused to submit to the jurisdiction of the court, but indicated that upon request, it would consider producing petitioner's tourist card application. But petitioner did not ask for, and the Mexican Consulate in New York obviously was in no position to know, let alone provide information relating to the circumstances of his removal. Moreover, petitioner presumed that the Mexican Government had sanctioned his ouster. He deemed it highly unlikely that the prosecution had not obtained Mexico's consent when it represented that Mexico had deported him.

that the prosecution would use the circumstances of his removal as proof of flight or that it would contend that he had been legally deported. Indeed, until full inquiry was made, he had no reason to believe that his removal was without the consent of the Mexican Government, nor was he in a position to prove such charges.

We have set forth in detail some of these matters to demonstrate that the very factors which underly this Court's action in *Alcorta* require similar relief to petitioner. But further, it serves to substantiate the contention that petitioner is not being afforded equal justice under the law. The denial of the minimal relief requested by this petitioner, that he be afforded an opportunity to demonstrate to this Court that he is entitled to a hearing to prove his charges, should not be met with judicial silence any more than should the substantial issues of fact have been resolved *ex parte* by the lower courts.

III.

Under the decisions of this Court, see *Price* v. *Johnston* and *Chessman* v. *Teets*, both *supra*, petitioner may make a second application for relief under Section 2255 on the basis of additional facts or reframed pleadings which would meet any purported deficiency in his present motions. It is common practice in the federal appellate courts to advise one of the basis of the Court's actions and, where possible, remand a Section 2255 proceeding to the district court with leave for the applicant to recast his pleadings, correct procedural defects or incorporate additional facts. Frequently the denial of relief on the appellate level is accompanied by a notation which aids the prisoner in properly framing a second application.

This sensible approach reflects the court's regard for doing justice and its aversion to stand upon technicalities as a basis for denying a prisoner relief. For "men incarcerated in flagrant violation of their constitutional

rights [must] have a remedy." *Commonwealth of Pennsylvania ex rel* v. *Claudy, supra*, at 123. It is the duty of the courts not merely to grant or deny relief but to set forth the guideposts to permit a prisoner to determine whether he is entitled to relief. Unfortunately, the complete silence of this Court in this instance in light of the peculiar antecedent events in the current litigation, deprives petitioner of an intelligent basis for determining the propriety and nature of a second application.

Concededly, a denial of a petition for writ of certiorari usually does not note the basis of this Court's action. Nor does the denial of such relief constitute approval of the action of the lower courts. Yet here, such silence prejudicially affects petitioner's ability to make use of the rights afforded him under *Price* v. *Johnson* and *Chessman* v. *Teets*.

The opinion of the district court in reality was not a response to petitioner's pleadings. Judge Kaufman, in his passionate defense of the validity and fairness of the original trial, misstated petitioner's charge to be that Huggins' testimony was false in that the Mexican authorities failed to comply with their own regular deportation proceedings in effecting his removal from that country. [A. 217-218] But the opinion completely ignored plaintiff's actual contention that the prosecution's fraud is founded upon the fact that he was kidnapped solely by agents of the prosecution with no involvement on the part of the Mexican authorities, and that this seizure was falsely characterized as an act of México. From this false premise, the district court erected its structure and disposed of the application by concluding that even if all the facts set forth in the motion were true, there was no ground for relief.

The district court concluded that the record demonstrated that the challenged evidence was tendered to prove the Mexican authorities had expelled or ejected petitioner

and that there was no intent or attempt on the part of the prosecution to prove he had been legally deported.

On the other hand, the Court of Appeals premised its affirmance upon the very opposite grounds. After evaluating the record as if a hearing had been granted, it found, *ex parte*, that petitioner had been deported by the Mexican Government. Perhaps it felt constrained to do so, otherwise it would have contradicted the decision of the Court of Appeals on the original appeal, when the original panel concluded that the challenged evidence established that petitioner had been legally deported by the Government of Mexico.*

Had the lower court done otherwise and acknowledged that petitioner was not deported, it would be constrained to find that on the original appeal the prosecution induced this error by representing that Mexico had deported petitioner. The Government completely ignored this problem in its opposition to the petition for writ of certiorari. The silence of this Court does not resolve the question.

Hence, this Court's denial of the petitions for writ of certiorari, without comment, accentuates the confusion created by the decisions of the two lower courts. Petitioner can only conjecture what in fact was the basis of this Court's action, as well as that of the lower courts.

Was there an insufficient factual showing of the falsity of the evidence or the prosecution's guilty knowledge? This hardly seems to be the basis when the government and the

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* As the Court then stated in *United States* v. *Rosenberg*, 195 F. 2 (d) 583:

"* * * The Government introduced evidence to show that Sobell had been legally deported from Mexico * * *" (at p. 603). "It seems particularly inconsistent, therefore, for Sobell not to have introduced evidence, during the trial, of his kidnapping to contradict the Government's evidence of legal deportation" (p. 603, footnote 20).

lower court have never suggested as much. Hearings have been granted on much less substantial pleadings. Was it that the fraud did not relate to the ultimate issue of guilt and innocence? We cannot conceive of this Court condoning such an approach.

Was it that petitioner knew or should have known all the facts that he alleges were suppressed and unknown to him? But that would be legally irrelevant and further, petitioner's awareness is itself an issue of fact, which could only be disposed of in the course of the hearing. Did the participation of local policemen, solely at the behest of the prosecution and unauthorized by any Mexican agency, convert the abduction into an act of the Mexican Government or a deportation by their authorities? We know of no law to support such a proposition.

Was it that petitioner touched upon some aspects of the issues in his motion in arrest of judgment? The decisions of this Court in *Price* v. *Johnson* and *Chessman* v. *Teets*, both *supra*, dispose of that argument which, if sanctioned would destroy the meaning and value of the writ. As Mr. Justice Douglas stated in his dissent in *Chessman*:

> "I for one would hate to see it [habeas corpus] abolished or greatly curtailed by Congress. It has done high service in the administration of justice. • • • Perhaps, as in Massey v. Moore, 348 U. S. 105, the issue could not be raised at the trial. Perhaps the trial lawyer failed to present it clearly. Perhaps only after the trial were the full facts known. Perhaps the issue was poorly focused in the trial court's charge. On habeas corpus the facts can be fully developed; and perhaps only then can the basic constitutional defect be laid bare."

Confusion is compounded further when the lower court denies without comment a motion to incorporate newly acquired evidence relating to the very issue upon which it disposed of the appeal. This document substantiated petitioner's allegations that he was not expelled, let alone

deported, by the Mexican Government. This Court's silence in not directing that the proceeding be remanded with leave to petitioner to amend his motion and incorporate the new document only makes more enigmatic the basis of its action.

If petitioner were to return to the district court and make a second application incorporating the newly acquired evidence, or by otherwise amending his application, neither petitioner nor the lower court would be afforded any basis for determining whether or not the matter was considered by this Court and whether or not the amended petition should be judged *de novo*. A prisoner burdened with a thirty-year sentence should not be caused to bear this judicially-caused confusion.

CONCLUSION

The petition for rehearing should be granted, this Court's order of November 12, 1957 vacated and writs of certiorari issued to the United States Court of Appeals for the Second Circuit.

In the alternative, the Court should remand the proceedings to the district court with directions that petitioner be granted leave to amend the motions by incorporating therein the newly acquired evidence.

Respectfully submitted,

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Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

MARSHALL PERLIN.